SERVED: April 19, 2007

NTSB Order No. EA-5280

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Issued under delegated authority (49 C.F.R. 800.24)
on the 19th day of April, 2007

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. JOSHUA FRANCA ROCHA, Respondent.	Docket SE-17768

ORDER DISMISSING APPEAL

On February 3, 2007, after the deadline, respondent, through counsel, filed a motion for leave to file his notice of appeal, from the law judge's December 27, 2006 order granting the Administrator's motion for summary judgment. Respondent's motion, to which the Administrator did not respond, is denied.

Background

The Administrator, corresponding in two separate letters on October 4, 2004, and July 5, 2005, advised respondent that the Administrator was uncertain about respondent's qualifications to hold a mechanic certificate with airframe and powerplant (A&P) ratings, and that a reexamination of his competency was necessary. On November 23, 2005, respondent submitted to a reexamination of his qualifications at the Flight Standards District Office (FSDO) in Miami, Florida. The Administrator alleges that the results of the reexamination were unsatisfactory.

Pursuant to FAA policy, respondent scheduled a second reexamination, to be conducted at the Miami FSDO on December 29, 2005. He later requested, and was permitted, to change the date for the second reexamination to January 4, 2006. Respondent failed to appear for that second reexamination.

The Administrator determined an emergency existed relating to safety in air commerce. As a result, on June 30, 2006, she issued an emergency order, immediately revoking respondent's mechanic certificate with A&P ratings. The Administrator mailed the emergency order of revocation to both respondent and Michael A. Moulis, Esquire.

Respondent filed a timely pro se appeal of the emergency order on July 5, 2006. On July 6, 2006, the Administrator filed the emergency order as her complaint, and mailed a copy of the complaint to respondent, but did not send a copy to Mr. Moulis.

The following day, respondent's son, Victor Rocha, called the Office of Administrative Law Judges (ALJs) on behalf of respondent, who does not speak English. See NTSB Form 2005.4, Internal Memo to the Docket File, July 7, 2006. Victor Rocha related that Mr. Moulis was representing some mechanics in the St. George Aviation cases[1] and that Mr. Moulis had given respondent some advice, but Mr. Moulis was not representing respondent, who was proceeding pro se. Id.

Also on July 7, the Administrator sent interrogatories, requests for production of documents, and requests for admissions to respondent, and did not send a copy to Mr. Moulis. A few days later, Victor Rocha again called the Office of ALJs and indicated he was respondent's representative. On behalf of respondent, Victor Rocha stated that respondent waived the emergency procedures of 49 C.F.R. part 821, subpart I. Victor Rocha also indicated he would call the FAA to discuss a reexamination. See Memo to the Docket File, July 10, 2006.

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[1] See Order 8300.10, FAA, Flight Standards Information Bulletin for Airworthiness, FSAW-04-10B, "Reexamination of Airframe and Powerplant Certificate Holders Who Took Oral and Practical Exams at the St. George Aviation Testing Center in Sanford, Florida," which resulted after a criminal investigation that revealed that, between October 10, 1995, and December 31, 1998, employees of St. George Aviation (SGA) issued numerous fraudulent A&P mechanic certificates. The Administrator determined she had a reasonable basis to question whether certificate holders (including respondent) tested by SGA, which was criminally prosecuted for conducting fraudulent examinations, possessed the qualifications to hold their certificates; she also determined she must reexamine the competency of those airmen to ensure safety.

Despite the indications that respondent was proceeding pro se, or that his son was representing him, on July 11, 2006, Mr. Moulis, on behalf of respondent, timely filed an answer to the Administrator's complaint, which, as noted above, had been mailed to respondent, but not to Mr. Moulis. But then, only 2 days later, the Office of ALJs received a facsimile copy of a letter addressed to Mr. Moulis, indicating that respondent would no longer be using Mr. Moulis's services, and that respondent would be representing himself.

On July 14, 2006, the FAA contacted the NTSB Office of ALJs to inform them that respondent had agreed to submit to another reexamination. The FAA followed that up with a July 27, 2006 letter to respondent, confirming conversations with respondent's son, on behalf of respondent, in which they had agreed to a second reexamination in November 2006 and postponement of hearing until after the reexamination. A copy of this letter to respondent was sent to the Office of ALJs, but not to Mr. Moulis.

In August 2006, the assigned law judge sent by certified mail a notice of hearing, scheduled for December 7, 2006, and a prehearing order to respondent, and not to Mr. Moulis. The docket file contains the returned envelope for the attempted delivery to respondent stamped by the Post Office as "unclaimed." The Office of ALJs resent the notice of hearing and prehearing order to respondent, again by certified mail, on November 7, 2006. This time, respondent received the notice and order, as indicated by his signature on the return receipt.

The Administrator sent a witness and exhibit list, as well as a list of citations, to respondent on November 14, 2006, but not to Mr. Moulis. On November 28, 2006, the Administrator served a motion for summary judgment on respondent, and did not send a copy to Mr. Moulis. The following day, respondent took the second reexamination of his qualifications at the Miami FSDO, and the results of that test were unsatisfactory.

On November 30, 2006, the Administrator, adding the second failed reexamination, served an amended motion for summary judgment on respondent and not on Mr. Moulis. The law judge issued an order continuing the hearing, served it on respondent, and did not send a copy to Mr. Moulis.

But, on December 11, 2006, Mr. Moulis, then acting again on behalf of respondent, filed an opposition to the motion for summary judgment. The law judge issued an order granting the Administrator's motion for summary judgment on December 27, 2006, and, although the law judge specifically referred to Mr. Moulis's December 11, 2006, "Answer in Opposition to Administrator's Motion for Summary Judgment," the Office of ALJs served the order on respondent only. The envelope was returned by the Post Office as "unclaimed" by respondent, but the Post Office did not return

the priority mail that the Office of ALJs had simultaneously sent to respondent's home address. The order included instructions advising that the Office of ALJs must receive a written notice of appeal within 10 days after the date on which the office had served the order.

The notice of appeal was due on January 8, 2007. An associate from Mr. Moulis's office called the Office of ALJs on January 31, 2007, regarding the status of respondent's case. The caller indicated Mr. Moulis had not been served the law judge's December 27, 2006 order; the Office of ALJs informed the caller they were not aware Mr. Moulis was representing respondent.

As previously noted, Mr. Moulis filed, on February 3, 2007, a motion for leave to file after deadline, to which the Administrator did not reply.

Discussion

We find that respondent has not provided good cause for his failure to file the notice of appeal by the deadline. Section 821.47(a) provides that, "[a] party may appeal from a law judge's ... appealable order by filing with the Board, and simultaneously serving on the other parties, a notice of appeal, within 10 days after the date on which the ... appealable order was served...." Safety Board precedent is clear that a party must establish that good cause existed for his or her inability to meet the deadline in § 821.47(a). See, e.g., Administrator v. McKee, NTSB Order No. EA-4676 (1998); Administrator v. Hooper, 6 NTSB 559 (1988).

Respondent asserts that good cause exists for his failure to file a notice of appeal before the deadline. In particular, respondent contends that he filed a timely answer in opposition to the motion for summary judgment through counsel, but the Office of ALJs did not serve the order granting the motion for summary judgment on respondent's counsel.

Mr. Moulis never filed a notice of appearance.[2] Further,

[2] In a case from another administrative law forum, the court dismissed a petition for review of an Immigration Judge's (IJ) decision that was not timely filed. Ram Singh v. INS, 315 F.3d 1186 (9th Cir. 2003). Singh filed a timely pro se notice of appeal asking for review by the Board of Immigration Appeals (BIA). Singh then retained counsel, who filed a brief before the BIA, but did not file a notice of appearance. When the BIA affirmed the decision of the IJ, the BIA decision was mailed to Singh's address of record. Because Singh had moved, neither he nor his counsel got actual notice until the time for appeal had passed. The court noted that Singh was unrepresented at the time he filed his appeal, that no notice of appearance was ever filed by counsel, and further that a notice of appearance enables a

Section 821.7(f) of the Board's Rules of Practice, *Designation of person to receive service,* sets forth this requirement: "[t]he initial document filed by a party in a proceeding governed by this part shall show on the first page the name, address and telephone number of the person or persons who may be served with documents on that party's behalf." In this case, the Emergency Notice of Appeal, which is the "initial document filed" for purposes of § 821.7(f), lists respondent's name and address. Without a notice of appearance or, at the least, a notification that service may be made upon a designated person, the Board's staff is not responsible for reviewing each document in a case file to determine upon whom documents should be served.[3]

In the absence of a demonstration of good cause to excuse respondent's failure either to file a timely notice of appeal or to submit a timely extension request for filing the notice after the deadline, Board regulations and precedent require the dismissal of respondent's appeal.

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's appeal is dismissed.

Gary L. Halbert
General Counsel

(..continued)
clerk to dispatch notices correctly without the need to review all documents in a file. The court found that the failure to file a timely petition was the result of counsel's not filing a notice of appearance, rather than impropriety on the part of BIA, and that counsel should have undertaken the minimal effort needed to advise BIA that notices should be sent to counsel rather than petitioner. Though not selected for publication and, therefore, of no precedential value, another case is instructive here. In Huan Sheng Luo v. Gonzales, 135 Fed. Appx. 941 (9th Cir. 2005), the court said it was petitioner's responsibility to update the immigration court regarding any change of address.

[3] Compounding any attempt to determine upon whom service should be made in this case, of course, is the episodic nature of Mr. Moulis's representation of respondent.